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Hearing Date: November 15, 2012 at 10:00 a.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PATRIOT COAL CORPORATION, et al., Debtors.	Chapter 11 Case No. 12-12900 (SCC) (Jointly Administered)
EASTERN ROYALTY LLC f/k/a EASTERN ROYALTY CORP., Plaintiff, v. BOONE EAST DEVELOPMENT CO., PERFORMANCE COAL CO., and NEW RIVER ENERGY CORP., Defendants.	Adv. Pro. No. 12-01786 (SCC)

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS

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ERC[1] respectfully submits this reply memorandum of law in further support of its motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

PRELIMINARY STATEMENT

ERC's opening brief demonstrated, and the Massey Entities' opposition brief now confirms, that the Payment Agreement is unambiguously not integrated[2] with any of the Assignments or the Boone Lease. The Defendants concede, as they must, that the plain language of the agreements does not support a conclusion that they form a single, indivisible contract. Instead, the Defendants argue only that the agreements are somehow ambiguous on the point and that discovery is necessary.

That argument fails. As demonstrated in detail below, the Defendants' attempt to manufacture an ambiguity where there is none requires an untenable reading of the agreements and several misstatements of the law. In perhaps the most blatant example of the latter, the Defendants assert the following, citing Williston on Contracts:

> It is axiomatic that "absent anything to indicate a contrary intention, written instruments executed at the same time, by the same contracting parties, for the same purpose, and in the course of the same transaction will be considered and construed together as one contract or instrument, even though they do not by their terms refer to each other." Williston on Contracts § 30:26.

[1] Capitalized terms not defined herein have the meanings ascribed to them in Plaintiff's Memorandum of Law in Support of Its Motion for Judgment on the Pleadings ("ERC Br."). Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Judgment on the Pleadings is referred to herein as "Opp. Br."

[2] The word "integrated" does double duty in contract law and has the potential to cause confusion. It can be used to mean that a contract or contracts reflect the entire agreement between contractual parties so that other contracts may not add to or vary their terms – hence the term "integration clause," which the Defendants agree is used interchangeably with the term "merger clause." (Opp. Br. at 26 n.15.) The word "integrated" can also mean that two contracts are treated as a single, indivisible contract, such that the breach of one will be the breach of the other. It is in this latter sense that the word is used here.

(Opp. Br. at 13-14.) The Defendants then add that this principle applies "even when the parties are different." (Opp. Br. at 14.) The obvious implication is that this principle is alone sufficient to suggest that the Payment Agreement might be integrated with the Assignments or with the Boone Lease. But that suggestion is a false statement of the law. The very section of Williston on Contracts that the Defendants cite goes on immediately to state, in language that the Defendants omit:

> Although multiple writings that relate to the same subject and are executed at the same time should be construed together in order to ascertain the parties' intent, it does not necessarily follow that all of the writings constitute a single contract or that any one (or more) of the writings should be considered merged into or unified with another such that every provision in each becomes a part of every other.

11 Richard A. Lord, Williston on Contracts, § 30:26 (4th ed. 1990) (emphasis added). In other words, while related agreements entered into contemporaneously, even if by different parties, can generally be "read" or "construed" together, they are not automatically treated as a single, indivisible contract. In fact, just the opposite is true: "[W]hen two parties have made two separate contracts, it is more likely that promises made in one are not conditional on performances required by the other." Rudman v. Cowles Commc'ns, Inc., 280 N.E. 2d 867, 873 (N.Y. 1972) (quoting 3A Arthur Linton Corbin, Corbin on Contracts § 696 (1960 ed.)).

Whether multiple agreements are treated as a single, indivisible contract – "the breach of one undoing the obligations under the other," id. – is a question of the parties' intent. Here, ERC and the Massey Entities made unambiguously clear, in the plain language of the contracts, that the Payment Agreement is not integrated with the Assignments, the Boone Lease, or any other agreement. Indeed, the Boone Lease alone demonstrates that fact. While the Defendants attempt here to claim that the Tonnage Payments due under the Payment Agreement constitute "rent"

under the Boone Lease – and that failure to pay the Tonnage Payments will breach the lease – the contracts themselves make such a conclusion not merely implausible, but impossible. As an initial matter, the Boone Lease does not even mention the Payment Agreement. More specifically, the Boone Lease carefully prescribes the rent due under the lease, which does not include the Tonnage Payments; it painstakingly identifies twenty-two events of default, none of which is a failure to make the Tonnage Payments; and it includes a merger clause that makes clear that the Payment Agreement was not part of the agreement reached between the parties to the lease. The conclusion is thus unavoidable that ERC and the Massey Entities did not intend for the Payment Agreement to be integrated with the Boone Lease. And when all of the agreements are "construed together," just as the Defendants insist, it is clear that the same conclusion applies to the Assignments.

For these reasons, the Massey Entities resort to an argument based on the Settlement Agreement. Unable to point to any provisions in their own contracts that suggest that they themselves intended for the Payment Agreement to be integrated with the Assignments or the Boone Lease, the Defendants claim that it was instead the intent of third parties Massey Coal Sales and Coaltrade in the Settlement Agreement. The Settlement Agreement, however, unambiguously reflects that Massey Coal Sales and Coaltrade did not intend for the thirteen agreements contemplated by the Settlement Agreement to function as a single, indivisible contract. In any event, their intent is, quite simply, legally irrelevant. The very notion that the intent of third parties, in a wholly separate contract, could override the contrary intent evidenced by ERC and the Massey Entities in the very agreements sought to be integrated is absurd on its face and unsupported by any authority.

As the Court is aware, contractual language is ambiguous only if it invites two reasonable interpretations. See In re 4Kids Entm't, Inc., 463 B.R. 610, 682-83 (Bankr. S.D.N.Y. 2011) (Chapman, J.). That is not the case here. The theory of integration proposed by the Massey Entities is not remotely plausible, under the law or the provisions of the contracts at issue. Accordingly, the agreements are not ambiguous, and ERC's motion should be granted as a matter of law.

APPLICABLE STANDARD AND GOVERNING LAW

The misstatements of law in the Defendants' brief begin with their statement of the applicable standards. The Defendants claim repeatedly that ERC must prove "beyond doubt" that there is "no set of facts" under which the Defendants might prevail. (Opp. Br. at 3, 6.) However, the "no set of facts" standard, which derives from Conley v. Gibson, was flatly rejected by the Supreme Court in Bell Atlantic Corp. v. Twombly. See 550 U.S. 544, 563 (2007) (explaining that the Conley standard "has earned its retirement" and "is best forgotten as an incomplete, negative gloss on an accepted pleading standard").[3] The standard no longer applies.

Motions under Rule 12(c), like those under Rule 12(b)(6), are instead now governed by a "plausibility standard." Boykin, 521 F.3d at 213. Where, as here, the plaintiff is seeking a judgment as a matter of law, the question is whether the defendant has raised a "plausible defense." See Flextech Rights Ltd. v. RHI Entm't, LLC, No. 09 Civ. 3462, 2010 U.S. Dist. LEXIS 5205, at *4 (S.D.N.Y. Jan. 21, 2010) (granting plaintiff's Rule 12 (c) motion where defendant failed to assert a "plausible" defense that, if proved, would defeat plaintiff's claim); Prowley v. Hemar Ins. Corp. of Am., No. 1:05 Civ. 981, 2010 U.S. Dist. LEXIS 45249, at *6-7

[3] See also Ashcroft v. Iqbal, 556 U.S. 662 (2009); Boykin v. KeyCorp., 521 F.3d 202, 213 (2d Cir. 2008) (noting that the Supreme Court has "explicitly rejected" the Conley standard).

(S.D.N.Y. May 5, 2010) (ruling that judgment on the pleadings is appropriate where "the nonmoving party has failed to allege facts that would give rise to a plausible claim or defense").

The question here, where the Defendants concede that the plain language of the contracts does not establish integration, is whether the Defendants have shown that the contracts are ambiguous. As the Court is well aware, that question presents an issue of law for the Court to decide. In re 4Kids Entm't, 463 B.R. at 681 ("Courts resolve the question of law as to whether or not a writing is ambiguous."); see also JA Apparel Corp. v. Abboud, 568 F.3d 390, 404 (2d Cir. 2009) (same).

Contrary to the Defendants' suggestion otherwise (Opp. Br. at 7-9), it is simply not true that determining whether multiple agreements should be treated as a single contract requires resort to extrinsic evidence. Defendants mischaracterize the statement in Rudman that the integration of multiple agreements turns on the "intent manifested, viewed in the surrounding circumstances." (Opp. Br. at 8 (quoting Rudman, 280 N.E.2d at 873) (emphasis added).) Defendants suggest that the underscored language requires the Court to consider extrinsic evidence.[4] That specific argument has already been rejected as nonsensical, because, if it were correct, "courts would no longer have to find ambiguity first before resorting to extrinsic evidence." In re Lehman Bros. Inc., 478 B.R. 570, 592 (S.D.N.Y. 2012). Not surprisingly, there are countless cases in which courts rule on integration questions as a matter of law, including

[4] Indeed, in their preliminary statement, the Defendants cite Novick v. AXA Network, LLC, 642 F.3d 304 (2d Cir. 2011), suggesting that the Second Circuit reversed summary judgment on contract integration where the court could not properly review "the parties' intent in entering into the affiliation agreements and the circumstances surrounding those agreements." (Opp. Br. at 1.) The Defendants' description of the case could not be more misleading. The Second Circuit did not, as the Defendants suggest, reverse summary judgment for further consideration of the "circumstances surrounding" the agreements. The appeal concerned a partial final judgment under Rule 54(b), and the Second Circuit concluded only that the district court's summary judgment ruling should "remain interlocutory" so that the final appeal could address all of the contractual claims under two contracts, including whether they were integrated, at once. See Novick, 642 F.3d at 314. The case simply has no bearing on the issues relevant here.

some cited in ERC's opening brief that the Defendants simply ignore. See, e.g., Cargill, Inc. v. Refco, Inc., No. 06 Civ. 2133 (PKC), 2006 WL 2664215, at * 4 (S.D.N.Y. Sept. 13, 2006) (ruling that two contracts were not integrated, on facts materially similar to those here, and ruling that discovery and an evidentiary hearing were unnecessary).[5] The Defendants' own cases are in accord. See, e.g., TVT Records v. Island Def Jam Music Group, 412 F.3d 82, 89 (2d Cir. 2005) ("But if the documents in question reflect no ambiguity as to whether they should be read as a single contract, the question is a matter of law for the court.").

As the New York Court of Appeals has explained, "[a]mbiguity is determined by looking within the four corners of the document, not to outside sources." Kass v. Kass, 696 N.E.2d 174, 180-81 (N.Y. 1998) (emphasis added). In that inquiry, courts "should consider the entire contract and consider the relation of the parties and the circumstances under which it was executed." Id. (emphasis added) (internal quotation marks omitted). "Particular words should be considered, not as if isolated from the context, but in light of the obligation as a whole and the intention of the parties as manifested thereby." Id. In other words, the "circumstances" relevant to the interpretation of the four corners of a contract include factors gleaned from the contract itself, not extrinsic evidence.

Here, considering the "surrounding circumstances" means nothing more than evaluating the very factors that ERC set forth in its moving brief: whether the agreements are set out in separate writings; whether the contractual parties to the agreements are identical; whether the

[5] See also Instead, Inc. v. ReProtect, Inc., No. 08 Civ. 5236, 2009 U.S. Dist. LEXIS 8264, at *17–18 (S.D.N.Y. Feb. 5, 2009) (granting motion to dismiss regarding severability despite plaintiff's "strained and unsupported reading" of an agreement that was unsuccessful in "creat[ing] ambiguity where there [was] none"); Schron v. Troutman Saunders LLP, 97 A.D.3d 87, 93 (N.Y. App. Div. 2012) (affirming motion to dismiss); Transammonia, Inc. v. Enron Capital & Trade Res. Corp., 278 A.D.2d 152, 153 (N.Y. App. Div. 2000); Inner City Telecomm. Network v Sheridan Broad. Network, 260 A.D.2d 257, 257 (N.Y. App. Div. 1999) ("When we look at the documents themselves, the severability of the Affiliation Agreement from the note is apparent."); Schonfeld v. Thompson, 243 A.D.2d 343, 343 (N.Y. App. Div. 1997).

agreements are supported by independent consideration; whether the agreements have different purposes; and other factors that are evident on the face of the agreements. (ERC Br. at 13-14.) Rudman itself is an example. See 280 N.E.2d at 873-74 (determining that two contracts were separate based on existence of separate assents, different parties, and different dates of execution); see also Lehman, 478 B.R. at 691-92 (considering the purpose of the contracts, but rejecting argument that consideration of "circumstances" of contract permit resort to extrinsic evidence).

The inquiry on this motion is simple: Have the Defendants shown, based on a reasonable view of the contracts, that it is ambiguous whether the parties intended for the Payment Agreement to be integrated with the Assignments or the Boone Lease?[6] For the reasons explained in detail below, the answer to that question is no.

ARGUMENT

POINT I.

THE PAYMENT AGREEMENT IS NOT AN EXECUTORY CONTRACT FOR PURPOSES OF SECTION 365 OF THE BANKRUPTCY CODE

The Massey Entities concede, as they must, that the Payment Agreement, standing alone, is not an executory contract. (Opp. Br. at 16 n.9; ERC Br. at 11-12.)

POINT II.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE ASSIGNMENTS

A. ERC and the Massey Entities Plainly Intended That the Payment Agreement Would Not Be Integrated with Any of the Assignments

[6] Merely asserting that a contract is ambiguous does not make it so. See In re 4Kids Entm't, Inc., 463 B.R. at 681 ("A contract is not rendered ambiguous just because one of the parties attaches a different subjective meaning to one of its terms.").

ERC's opening brief demonstrated that neither ERC nor the Massey Entities intended for the Payment Agreement to be integrated with any of the Assignments. In every relevant way, the parties demonstrated the opposite intent. They separated the Payment Agreement and each of the Assignments into (i) discrete writings (ii) that had different contractual parties, (iii) that were supported by distinct and independent consideration, (iv) that served different purposes, (v) that had different durations, and (vi) that did not make a breach of one the breach of another. (ERC Br. at 14-19.)

In the face of this litany of evidence demonstrating a clear intention not to integrate the Payment Agreement with the Assignments (or the Boone Lease), the Defendants come forward with cases stating that "New York law requires that all writings which form part of a single transaction and are designed to effectuate the same purpose be read together, even though they were executed on different dates and were not all between the same parties." This Is Me, Inc. v. Taylor, 157 F.3d 139, 143 (2d Cir. 1998) (emphasis added); see also Opp. Br. at 14. As noted above, relying on these cases to suggest that they bear on the question of integration is wholly misleading. There is a critical difference – especially important in this action – between "reading" or "construing" multiple agreements together and concluding that the agreements constitute a single, indivisible agreement.[7] As Williston on Contracts (relied on heavily by the Massey Entities) explains:

[7] The cases cited by the Defendants are not to the contrary. In This Is Me, the Second Circuit did not end its analysis after concluding that the agreements at issue could be construed together. It proceeded then to assess whether certain parties could be held to a requirement in one of the contracts based on the interplay of the provisions of those agreements. See This Is Me, 157 F.3d at 146. In Commander Oil Corp. v. Advance Food Serv. Equip., 991 F.2d 49 (2d Cir. 1993), on which the Defendants heavily rely (Opp. Br. at 16), the Second Circuit construed an asset purchase agreement together with a related lease in order to interpret indemnities provided in each agreement, but it did not conclude that the two agreements were integrated into a single contract. See id. at 52-55. Likewise, in Kurz v. United States, 156 F. Supp. 99 (S.D.N.Y. 1957), the court construed a separation agreement and a resulting trust agreement together to resolve a dispute regarding the trust agreement, but it did not treat the two contracts as integrated.

> The principle that contemporaneous writings should be construed together means simply that if any provision in one of them limits, explains, or otherwise affects the provisions of another, all of the provisions should be harmonized and given effect as between the parties. . . . This does not mean that the provisions of one instrument are imported bodily into another, contrary to the intent of the parties.

Williston on Contracts, § 30:26 (emphasis added). Indeed, as the court made pointedly clear in Refco (a case cited by ERC but simply ignored by the Defendants), "the fact that agreements are related and ought to be construed in light of one another does not necessarily make them a single contract." Refco, 2006 WL 2664215, at *4 (emphasis added); see also Rosen v. Mega Bloks, Inc., No. 06 Civ. 3474, 2007 WL 1958968, at *5 (S.D.N.Y. July 6, 2007) ("Parties are free to enter into multiple contracts as part of a single transaction without the provisions in one contract governing another contract.").

In cases that ERC cited in its moving brief, but that Defendants completely ignore, New York courts have made clear that treating multiple contracts as integrated solely because they were executed contemporaneously and as part of the same larger transaction "is without foundation in either law or logic." Nat'l Union Fire Ins. Co. v. Williams, 223 A.D.2d 395, 396 (N.Y. App. Div. 1996); see also Nat'l Union Fire Ins. Co. v. Clairmont, 231 A.D.2d 239 (N.Y. App. Div. 1997). In rejecting claims that two contracts were integrated, for example, the court in Williams ruled that "[w]hile the respective agreements are unquestionably part of the same overall transaction, each involves different parties and serves a distinct purpose." Williams, 233 A.D.2d at 396. Notably, the court in Clairmont expressly rejected the reasoning in National Union Fire Insurance v. Turtur (on which the Defendants do rely):

> To the extent that the Second Circuit's decision in National Union Fire Insurance Co. v. Turtur (892 F.2d 199) may be read to require a trial on the issue of contractual separability in circumstances such

> as those presented at bar and in Williams, we decline to follow it. Turtur, it should be pointed out, antedates Williams, and it is fair to assume that if the chronology had been reversed, Turtur, which did after all, purport to apply New York law, might well have been differently decided.

Clairmont, 231 A.D.2d at 243. Turtur is irrelevant here for many reasons, but the mere fact that the Defendants would be compelled to rely on it, notwithstanding this clear rejection of its reasoning under New York law, is symptomatic of the utter weakness of the Defendants' argument in this case.

In short, the Massey Entities consume many pages in their brief establishing a point that is not in dispute: that the Payment Agreement, the Assignments, and the Boone Lease can be construed together. The relevant issue is instead whether ERC and the Massey Entities intended for the Payment Agreement to be integrated with any of the Assignments or the Boone Lease.[8] On that issue – and the factors relevant to resolving it – the Massey Entities are essentially silent, because no reasonable dispute is possible:

- Separate Contracts with Separate Assents. The Defendants have no answer to the fact that ERC and the Massey Entities carefully documented the Payment Agreement, the Assignments, and the Boone Lease in discrete contracts with separate assents. As noted above, the Defendants do not even address, let alone distinguish, the ruling in Clairmont that absent a "clear indication" to the contrary, "contracts manifesting separate assents to be bound are generally presumed to be separable." 231 A.D.2d at 242-43. The Defendants also ignore the instruction in

[8] Rosenblum v. Travelbyus Ltd., 299 F.3d 657 (7th Cir. 2002), which applies Illinois law, provides a succinct example of the two-step analysis that is required here – first, whether the multiple agreements can be construed together (an issue not in dispute here), and, second, whether those multiple agreements, when read together, reveal an intent to be treated as a single contract: "At the outset of our inquiry, we think it is important to examine the two contracts as a whole and to determine their relationship to each other. In undertaking such an evaluation, it becomes immediately evident . . . that these agreements were both necessary, but self-contained, as components of a comprehensive business transaction. While the contracts are related, they are not two sections of the same agreement; they are separate, free-standing contracts. Each contract delineates rights and duties independent of the other and that pertain to a particular subject matter. One contract may be fully performed while the other is breached." Id. at 663. The same could be said – almost exactly – about the Payment Agreement and each of the Assignments and the Boone Lease. While the agreements are no doubt related, each one is indisputably separate, self-contained, and independent.

Rudman that "when two parties have made two separate contracts, it is more likely that promises made in one are not conditional on performances required by the other." 280 N.E.2d at 873 (quoting Corbin on Contracts § 696 (1960 ed.)). The Defendants do nothing more than argue that separate contracts can sometimes be "construed together." (Opp. Br. at 13-14.)

- Different Contractual Parties. The Defendants also have no answer to the fact that the Payment Agreement, the Assignments, and the Boone Lease were each executed by a different set of parties. That fact is "a circumstance weighing heavily in favor of contractual separability." Clairmont, 231 A.D.2d at 242; see also Rudman, 280 N.E. 2d at 873-74 ("Recognizing that the agreements involved formally different parties, and actually executed on different dates in June, 1966, the conclusion of separateness becomes all but inescapable." (emphasis added)). The Defendants (again) ignore altogether Arciniaga v. General Motors Corp., which concluded that two agreements were separate where one was between Arciniaga, GM, and Bay Chevrolet, and the other agreement was between GM and Bay Chevrolet. 460 F.3d 231, 237 (2d Cir. 2006). Again, the Defendants' only response is that "agreements may be construed together as part of a single transaction even when the parties are different," a wholly different – and undisputed – issue. (Opp. Br. at 14.)

- Supported by Separate Consideration. As discussed in more detail below in connection with the Boone Lease, ERC and the Massey Entities specifically bargained for the separate treatment of the Payment Agreement by making clear that it was supported by "additional" consideration that is separate from the independent consideration supporting the Assignments and the Boone Lease. In their usual pattern, the Defendants simply ignore the cases cited by ERC that find that independent consideration in separate contracts evinces an intent not to make them a single, indivisible contract. (ERC Br. at 16.) Most notably, the Defendants ignore Refco, which specifically rejected an argument – advanced by Defendants here (Ans. ¶ 41; Opp. Br. at 17) – that two contracts are integrated simply because one party insists that it "would not have entered into [one contract] independently from [the other]." 2006 WL 2664215, at *5.[9]

[9] The cases cited by the Defendants are fully consistent with ERC's position. Two of them – TVT and Kurz – concern reading contracts together, not integration. While the Defendants claim that Kurz supports the proposition that "integration 'applies with particular force in situations where, as here, one document requires the execution of the second to accomplish its purpose" (Opp. Br. at 17), Kurz actually says "[t]his canon of construction" – i.e., reading related contracts together – where the Defendants insert "integration." The remaining case cited by the Defendants on this point, Preston v. Metro. Lincoln-Mercury, Inc., 53 B.R. 589, 591 n.4 (Bankr. M.D. Tenn. 1985), finds that two documents were integrated where there was a lack of independent consideration supporting the two documents. The court ruled that one party's agreement to provide vehicles, identified as "further consideration" for an asset sale, was part of the asset sale agreement because the promise to provide the vehicles was not paired with any reciprocal consideration that would allow it to stand alone as a contract. Id. at 591, n.4. That is not the case here, where the Payment Agreement, the Assignments, and the Boone Lease are each supported by distinct and independent consideration.

- Different Purposes and Subject Matter. The Defendants claim that the purpose of the Payment Agreements, the Assignments, and the Boone Lease was "to facilitate the transfer of mining rights in several tracts of land owned or controlled by the Massey Entities to ERC in exchange for Tonnage Payments from the coal mined on those tracts of land." (Opp. Br. at 15.) As explained in detail below, the Boone Lease alone demonstrates the falsity of that view of the contracts. The Boone Lease expressly disclaims any notion that the lease requires payment of the Tonnage Payments. The Payment Agreement was instead intended to provide ongoing payment streams to the respective Massey Entities in exchange for their agreement to enter into the Assignments and the Boone Lease. (ERC Br. at 17.) The Defendants' attempt to distinguish In re Plitt Amusement Co. of Wash., Inc., 233 B.R. 837 (Bankr. C.D. Cal. 1999), fails. Contrary to Defendants' misleading suggestion otherwise (Opp. Br. at 15), the case directly addresses an analogous situation – whether leases were incorporated by reference in a purchase agreement that referred expressly to the leases – and concludes that the agreements were not integrated. (ERC Br. at 17.)

- Different Durations. ERC's opening brief demonstrated that where one agreement is intended to outlast another, courts routinely consider that fact a strong indication that the agreements were not intended to be integrated. (ERC Br. at 18.) The Defendants do not cite any cases to the contrary. Nor do they dispute that the Assignments cannot be read to be directly coextensive in duration with the Payment Agreement, which continues for an indefinite period. Instead, the Defendants' only argument is that, "in practice," ERC will continue to perform under the underlying leases. But those leases are between ERC and third-party landowners and are not even arguably integrated with the Payment Agreement. The duration of those leases, and whether the Payment Agreement is coextensive with them, have no relevance to whether the Assignments and the Payment Agreement are themselves integrated as a single, indivisible contract.

- Lack of Cross-References in the Assignments. The Defendants have no answer to the fact that the Assignments do not make any reference to the Payment Agreement. While they note that the Payment Agreement references the Assignments (Opp. Br. at 12 n.6), the reverse is not true. That fact is enormously significant – not "irrelevant," as the Defendants claim (id.) – where the Defendants argue that the Assignments would be breached if ERC failed to perform under the Payment Agreement. If that were actually the case, the parties would have said so (in either agreement) and would at the very least have mentioned the existence of the Payment Agreement in the Assignments. They did neither. See In re Adelphia Bus. Solutions, 322 B.R. 51, 59 (Bankr. S.D.N.Y. 2005) ("Neither Lease explicitly recites an intention that the two documents be treated as a single contract, though the parties could have easily provided, if that were their intention.").

On the question of integration (as distinct from whether the agreements should be "read together"), the Massey Entities assert only that the Payment Agreement is integrated with the Assignments (and the Boone Lease) because the Payment Agreement "specifically references" and "attaches" those separate agreements and "requires their execution." (Opp. Br. at 12.) The Massey Entities cite no case to support this conclusion. Indeed, they ignore altogether the cases cited by ERC which provide that even though one agreement may depend on the execution of another agreement, they may be independently enforceable. (ERC Br. at 16-17, 21); see Refco, 2006 WL 2664215, at *5 (holding that two contracts were not integrated notwithstanding the counterparty's insistence that it "would not have entered into [one contract] independently from [the other contract]"); Clairmont, 231 A.D.2d at 241 ("[O]ne agreement may follow from and even have as its raison d'etre another and yet be independently enforceable."); Wang v. N.Y. Transit, No. 91 Civ. 8695 (SAS), 1997 U.S. Dist. LEXIS 16139, at *8 (S.D.N.Y. Oct. 14, 1997) (explaining that although execution of one agreement was a condition of entering into a second agreement, it was "apparent" that the former "was intended to stand on its own").

The Massey Entities also argue that the Payment Agreement "expressly incorporates the Assignments and the Boone Lease by reference for the definition of the respective 'Assigned Reserves.'" (Opp. Br. at 12.) Their suggestion that the Payment Agreement thereby incorporated the Assignments in their entirety again misstates the law. Following a pattern in their brief, the Massey Entities cite Williston on Contracts for the broad principle that "[w]hen a writing refers to another document . . . the two form a single instrument," (Opp. Br. at 12 (citing Williston on Contracts § 30:25)), but leave off the critically relevant language that follows: "it is important to note that when incorporated matter is referred to for a specific purpose only, it becomes a part of the contract for that purpose only, and should be treated as irrelevant for all other purposes."

Id. Here, the parties used the term "Assigned Reserves" in the Payment Agreement for a specific and narrow purpose: to identify the coal reserves that would be used to calculate the Tonnage Payments.[10] This limited incorporation by reference of a defined term actually demonstrates that the parties did not intend to incorporate the Assignments or the Boone Lease wholly into the Payment Agreement – which they could have done, but did not.[11] See Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp., 534 F.2d 422, 441 (2d Cir. 1975) (holding that, where parties to a settlement agreement "chose to cite only a specific portion of" concurrently negotiated collective bargaining contracts, the former cannot "be read as incorporating by reference all relevant provisions of" the latter because "[h]ad that been the desire of the contracting parties, they could have done so expressly.").

In sum, ERC and the Massey Entities plainly and unambiguously intended that the Payment Agreement would not be integrated with any of the Assignments. No reasonable argument to the contrary is possible.

[10] Relatedly, the court in In re Plitt found that while the purchase agreement in that case repeatedly referred to the lease that the parties simultaneously executed – as the Payment Agreement does here – each such reference treated the leases "as objects that the debtor was purchasing under the contract" and did not "refer to the substantive provisions of the leases." In re Plitt 233 B.R. at 844 (applying Washington law). Therefore, the court ruled, the purchase agreement did no incorporate the lease as one integrated agreement. Id. at 845.

[11] In a footnote, the Defendants also misleadingly suggest that the provision in the Payment Agreement providing that certain "Assigned Reserves" are "specified in and subject to" the Berwind-New River Partial Assignment incorporates that entire Assignment by reference. (Opp. Br. at 13 n.7.) The cases cited by the Defendants involve circumstances where one contract is made "subject to" another. Here, the Payment Agreement is not made "subject to" the Assignments, or vice versa. Instead, the Payment Agreement states that certain "Assigned Reserves specified in and subject to the Berwind-New River Partial Assignment" will be subject to further payments. That is, the parties were making clear which "Assigned Reserves" – i.e., only those "specified in and subject to the Berwind-New River Partial Assignment" – would be the subject of the additional payments, not incorporating the entire Assignment by reference into the Payment Agreement. In short, it requires only a brief glimpse at the actual language of the agreement to reject this argument.

B. Even If the Payment Agreement Were Integrated with Any of the Assignments, Each Resulting Agreement Would Still Be Non-Executory

As demonstrated in ERC's opening brief, even if the Payment Agreement were integrated with any of the Assignments, each resulting contract would not be an executory contract, because the Massey Entities owe no material obligations to ERC under their respective Assignments. (ERC Br. at 10.)

The Massey Entities respond by going on at length about the indemnification obligations that ERC undertook in the Assignments, claiming that they will "demonstrate, through a record developed in discovery, that ERC's acceptance of certain base lease obligations, as well as its agreement to broad rights of indemnification, were material inducements absent which Defendants would not have agreed to enter into the Assignments." (Opp. Br. at 20-21.)

But if the Payment Agreement were integrated with one or more of the Assignments, the relevant question would be whether the Massey Entities – not ERC – owed material obligations that rendered the combined agreements executory. On that point, the Massey Entities have no reasonable argument that the indemnities they provided are material. Each of the Massey Entities agreed to indemnify ERC for their respective "negligence in the conduct of operations on the Retained Premises, failure to comply with any provision of the [governing lease] or the terms of this Partial Assignment, or failure to comply with any applicable federal or state law or regulation." (Compl., Exs. C-F ¶ 3.) The "Retained Premises" are those coal reserves that the Massey Entities did not assign to ERC and that they would continue to mine under the governing lease. Accordingly, the Massey Entities agreed to indemnify ERC for claims arising out of its prior and ongoing, parallel operations under the same lease. Such an indemnity "is an obligation

that is imposed by law and does not constitute a significant independent obligation which would cause the [counterparty's] performance under the agreements to be viewed as incomplete and executory." In re Stein & Day Inc., 81 B.R. 263, 266 (Bankr. S.D.N.Y. 1988); In re Chateaugay Corp., 102 B.R. 335, 349 (Bankr. S.D.N.Y. 1989) (finding an indemnity insufficient to render a contract executory).[12]

The cases cited by the Massey Entities prove the point. The indemnity in In re Safety-Kleen Corp. was material because it provided for an allocation of liability that was "not duplicative of the rights and obligations provided for by CERCLA." 410 B.R. 164, 169 (Bankr. D. Del. 2009) (emphasis added). That fact "affords parties a benefit that retains its benefit in the context of whether or not a contract is executory in bankruptcy." Id. Likewise, Preston involved a broad indemnity for "any liability, expense, or detriment caused by Seller's operation of the business," which would not be coterminous with obligations imposed by law. See 53 B.R. at 590. The indemnity provided by the Massey Entities is not analogous to those in Safety-Kleen or Preston and therefore will not support a conclusion that the Assignments, even if integrated with the Payment Agreement, form executory contracts.[13]

[12] See also Manhattan Real Estate Partners, I.L.P. v. Harry S. Peterson Co., Inc., No. 90 Civ. 3015 (LJF), 1992 WL 350774, at *3 (S.D.N.Y. Nov. 12, 1992) (interpreting New York law) ("As a general rule, [a]n implied right to indemnification exists where one party who has committed no actual wrong is being held vicariously liable for the wrongdoing of another." (internal quotation marks and citation omitted)). Contrary to Defendants' suggestion that providing for attorney's fees renders the indemnity material (Opp. Br. at 21), "it is also clear that the implied or common law duty to indemnify includes the obligation to pay attorney's fees." Id. at *2.

[13] In any event, there is no dispute that ERC could separately reject the Assignments (and the corresponding obligations under the Payment Agreement) if the Court concluded that the Assignments were integrated with the Payment Agreement and were in fact executory. (Opp. Br. at 15.)

POINT III.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE BOONE LEASE

Tellingly, the Defendants studiously avoid analyzing the Boone Lease separately from the Assignments. That is so because, while the Boone Lease is not integrated with the Payment Agreement for all of the same reasons that the Assignments are not (ERC Br. at 20), the Boone Lease makes unmistakably clear in additional ways that neither ERC nor the Massey Entities intended for the Payment Agreement to be integrated with any other agreement. Indeed, it is here that the Defendants' emphasis that the Payment Agreement, the Assignments, and the Boone Lease be "construed together" most hurts them. It is impossible to look at the Boone Lease and conclude that it is integrated with the Payment Agreement, and there is nothing in the Assignments that suggests that the parties intended for them to be treated any differently.

The argument advanced by the Massey Entities here is essentially that the Tonnage Payments required by the Payment Agreement are rent owed under the Boone Lease. (Opp. Br. at 16-18.) The problem for them is that when the Boone Lease was executed, the parties made unambiguously clear – many times over – that the Tonnage Payments were not part of the rental obligations under the lease. The Boone Lease specifically provides that ERC will pay rent in the form of "tonnage royalties" that are separate and distinct from the Tonnage Payments under the Payment Agreement. (Boone Lease, Ex. G, at § 7.1.) The Boone Lease also exhaustively lists twenty-two separate events of default, none of which is failure to pay the Tonnage Payments (and one of which is failure to pay the separate "tonnage royalties" owed as rent under the lease). (Id. § 19.) Finally, the Boone Lease has a merger clause that provides that "[t]his Lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties." (Id. § 23.7.)

The Defendants' only response is to claim that these terms in the Boone Lease result in a "conflict" with the Payment Agreement, "which provides that its terms serve as 'additional consideration' for the Boone Lease." (Opp. Br. at 18.) The position is absurd. Given the clear and unambiguous terms of the Boone Lease, there is no remotely plausible argument that the Tonnage Payments constitute rent under the lease. Even if representatives of the Massey Entities were to make such a claim in sworn deposition testimony – and it is difficult to see how they could do so credibly – the obvious response is that they agreed in writing to something different. Indeed, the rental terms in the Boone Lease make unambiguously clear that the Payment Agreement was intended to be supported by "additional consideration" that was separate from the consideration independently supporting the Boone Lease and the Assignments. In short, there can be no doubt that ERC and the Massey Entities specifically bargained for the separate treatment of the Payment Agreement. Indeed, the Defendants concede as much in their putative counterclaim, which purports to assert a claim for post-petition breach of the Payment Agreement – but not the Boone Lease.

Accordingly, under no reasonable interpretation is the Payment Agreement integrated with the Boone Lease. Reading the two agreements as separate is the only way to read all of the provisions in the Payment Agreement and the Boone Lease harmoniously, and it is a cardinal principle of contractual interpretation that agreements must "be so construed, if possible, as to give meaning to every word, phrase and clause and also render all [their] provisions consistent and harmonious." Coleman v. Sopher, 499 S.E.2d 592, 602 n.12 (W. Va. 1997) (internal quotation marks and citation omitted); see also Two Guys from Harrison-N.Y. v. SFR Realty Assoc., 472 N.E.2d 315, 318 (N.Y. 1984). The Defendants' view, by contrast, would require the

Court to ignore the rental provisions, the events of default, and the merger clause in the Boone Lease.

Finally, there is nothing in the terms of the Assignments, which the Defendants concede must be construed together with the Boone Lease, that suggests that the parties intended anything different with respect to the Assignments. ERC and the Massey Entities made unmistakably clear that the Payment Agreement would not be integrated with any of the Assignments or the Boone Lease. No other conclusion is reasonably possible on the face of the contracts.

POINT IV.

THE PAYMENT AGREEMENT IS NOT INTEGRATED WITH THE SETTLEMENT AGREEMENT

Faced with the utter lack of support for the view that ERC and the Massey Entities themselves intended for the Payment Agreement to be integrated with any of the Assignments or the Boone Lease, the Defendants resort in their Answer to an argument that such integration was someone else's intent – i.e., the supposed intent of Massey Coal Sales and Coaltrade in their Settlement Agreement.[14] That argument fails for multiple reasons.

As an initial matter, the notion that contracts can be integrated by the intent of nonparties to those contracts is baseless, and the Defendants cite no authority to support it. Contrary to the Defendants' suggestion, TVT is not "instructive" on this issue. (Opp. Br. at 23.) In TVT, the Second Circuit concluded that the defendant IDJ, a party to a follow-on agreement (the "SLA"), was also a party to the original agreement that it did not sign (the "HOA") – and therefore could

[14] Notwithstanding their denial (Opp. Br. at 2 (citing Answer ¶¶ 38,41)), the Defendants never claimed in their pleading that the Payment Agreement is directly integrated with the Assignments or the Boone Lease – precisely because there is no evidence that the parties so intended. Paragraph 38 of the Answer sets forth the Defendants' theory of indirect integration through the Settlement Agreement, and Paragraph 41 asserts that, absent the Payment Agreement, "Defendants would not have entered into the Assignment Agreements, the Boone Lease, or the other instruments that are attached to the Settlement Agreement." (Answer ¶¶ 38,41 (emphasis added).)

not have tortiously interfered with the HOA – because the SLA incorporated the HOA by reference. TVT, 412 F.3d at 89. Among other things, the SLA obligated IDJ to "honor all of the terms and conditions set forth in the [HOA]" and "the SLA modified the profit distribution formula in the HOA to provide significant payments directly to IDJ." Id. In those circumstances, it was clear that IDJ had intended to incorporate by reference an agreement that it did not sign. Those circumstances are the reverse of what the Massey Entities argue here. They do not contend, nor could they, that ERC (or the Massey Entities) incorporated the Settlement Agreement by reference in the follow-on agreements here (the Payment Agreement, the Assignments, and the Boone Lease). Instead, they argue that the supposed intent of Massey Coal Sales and Coaltrade in the Settlement Agreement has some controlling power over the Payment Agreement, the Assignments, and the Boone Lease, regardless of the contrary intent evinced by ERC and the Massey Entities, the only parties to those separate agreements. There is no support in TVT or any other case for that proposition.[15]

The Defendants' attempt to invoke estoppel (Opp. Br. at 24-25) is in fact a concession that contract law does not support the Defendants' argument regarding the Settlement Agreement. The argument exemplifies the extremes to which the Massey Entities need to go to supplant their own contractual intent with the supposed intent of strangers. The Massey Entities do not cite a single case that applies estoppel to enforce anything other than arbitration and

[15] The other cases cited by the Defendants do not involve integration. See Kurz, 156 F. Supp. at 104 (concluding that related agreements can be "construed" together); Rhythm & Hues, Inc. v. Terminal Marketing Co., No. 01 Civ. 4697 (AGS), 2002 WL 1343759, at *1 (S.D.N.Y. June 19, 2002) (same); In re Application for Water Rights of the Town of Estes Park in Larimer County, 677 P.2d 320, 327 (Colo. 1984) (same); D.H. Pritchard, Contractor, Inc. v. Nelson, 147 F.2d 939, 942 (4th Cir. 1945) (holding contractual successor in interest to an agreement he did not sign).

forum selection clauses, and we are aware of none.[16] In any event, it is well settled that estoppel cannot be used – as the Massey Entities propose – by a non-signatory to a contract to bind another non-signatory to that contract. See, e.g., Choctaw Generation L.P. v. Am. Home Assurance Co., 271 F.3d 403, 406 (2d Cir. 2001) (holding one theory of estoppel may only be invoked by a signatory, and the other only against a signatory).[17]

Notably, the Defendants do not even address In re Gardinier, 831 F.2d 974 (11th Cir. 1987), which concludes that it would be "illogical" to conclude that contracts between different parties form a single agreement, even where one contract is conditioned on the completion of another (just as the Settlement Agreement was conditioned on execution of the agreements attached as exhibits). (ERC. Br. at 24-25.) That conclusion applies directly here, a fact that the Defendants concede by their silence.

In any event, even assuming that the intent of the parties to the Settlement Agreement – Coaltrade and Massey Coal Sales – mattered, those parties unambiguously did not intend to integrate into a single contract the thirteen separate agreements that the Settlement Agreement contemplated. Just the opposite: as demonstrated in ERC's moving brief (ERC Br. at 28-29), the agreements make unavoidably clear, in multiple ways, that the thirteen agreements were intended to have lives of their own going forward. No other possibility would even be

[16] See, e.g., Adelphia Recovery Trust v. Bank of Am., N.A., No. 05 Civ. 9050 (LMM), 2009 U.S. Dist. LEXIS 63375, at *44 (S.D.N.Y. July 8, 2009) (noting the doctrine was developed in the "arbitration context" and leaving open the question whether to extend it to jury trial waivers).

[17] See also Invista S.À.R.L. v. Rhodia, S.A., 625 F.3d 75, 85 (3d Cir. 2010) ("Although Rhodia S.A. correctly notes that non-signatories can be compelled to arbitrate under the doctrine[] of equitable estoppel . . . the argument overlooks the rather crucial fact that Rhodia did not sign any agreement to arbitrate the claims either. Not surprisingly, Rhodia, SA offers no authority for its contention that a non-signatory to an arbitration agreement can compel another non-signatory to arbitrate certain claims, and we have found none."); Am. Personality Photos, LLC v. Mason, 589 F. Supp. 2d 1325, 1331 (S.D. Fla. 2008) ("Because both Mason, in his individual capacity, and APP are both non-signatories, Mason's motion to compel arbitration has little merit based upon the above authorities.") (applying Second Circuit and New York law).

practicable, given that the agreements concern disparate commercial arrangements among thirteen separate legal entities – now spread over at least three corporate families (Patriot, Peabody, and Alpha).

The Defendants have no answer other than to rely exclusively on the fact that the merger clause in the Settlement Agreement refers to the Settlement Agreement and the exhibits thereto as the "integrated memorial" of the agreement reached between Massey Coal Sales and Coaltrade. Mere use of the word "integrated," however, does not incorporate by reference all of the exhibits to the Settlement Agreement, making them all a single, indivisible contract. If Massey Coal Sales and Coaltrade had intended to do that, they could have said so. They did not – indeed, the Defendants themselves concede that the terms "integration clause" and "merger clause" are used interchangeably to mean the same thing. (Opp. Br. at 26 n.15 (citing Wall v. CSX Transp., Inc., 471 F.3d 410, 415 n.4 (2d Cir. 2006)).)

The Defendants' argument to the contrary has already been made and rejected. In Rosen v. Mega Bloks Inc., the court was presented with virtually identical contractual language stating that the exhibits to a contract are "integral part[s]" of that contract and that the contract "and all of its exhibits comprise the 'entire agreement' among the parties." 2007 WL 1958968, at *4. Moreover, unlike here, the contract and the agreements listed in its exhibits were executed at the same time. Id. Nevertheless, the court, looking solely at the face of the documents, held that the contract and the agreements listed in its exhibits were not a unitary contract: "The mere fact that a document is an 'integral part' of a larger transaction does not mean that any provision contained in that document must be applied to all other documents that are part of the same transaction. . . . Parties are free to enter into multiple contracts as part of a single transaction without the provisions in one contract governing another contract." Id. at *5 (citing 11 Williston

on Contracts, supra, § 30:26). In short, as explained in Rosenblum, 299 F.3d at 664-65, there is simply no reasonable way to read Section 15 of the Settlement Agreement as an incorporation clause.

It bears repeating that even if Section 15 of the Settlement Agreement could be read as the Defendants insist, which it cannot, it would be evidence solely of the intent of Massey Coal Sales and Coaltrade. Whether those parties wanted to treat the thirteen contracts as a single agreement for purposes of resolving their litigation is irrelevant to whether ERC and the Massey Entities intended for the Payment Agreement, the Assignments, and the Boone Lease to function as a single contract as between them. There is no evidence – none – that ERC or the Massey Entities so intended, which is the very reason that the Massey Entities have resorted to an argument based on the Settlement Agreement.[18]

Indeed, the Defendants' brief concludes with an attempt to suggest that the merger clause in the Boone Lease "directly conflict[s]" with Section 15 of the Settlement Agreement. Far from showing that the agreements in question are ambiguous, the contradictory nature of Defendants' interpretation merely demonstrates that it is wrong. See Lawyers' Fund for Client Protection v. Bank Leumi Trust Co., 727 N.E.2d 563, 566-67 (N.Y. 2000) (holding a contractual interpretation that renders a clause superfluous is "unsupportable under standard principles of contract interpretation"). The "conflict" that Defendants identify arises only when the various agreements are construed as a single, indivisible agreement. By contrast, when the agreements

[18] Recognizing that there is no argument that the Payment Agreement is integrated with the Settlement Agreement, the Assignments, or the Boone Lease, the Defendants briefly float the idea that perhaps there are other agreements that no one knows about that might be integrated with the Payment Agreement. (Opp. Br. at 11.) That position exemplifies the baselessness of the Defendants' entire response to this motion. The notion that there are any other agreements that are potentially integrated with the Settlement Agreement, and that the Massey Entities need discovery to explore that possibility, is absurd on its face. Suffice it to say that the Defendants' Answer does not contain even a whisper of such an allegation, and it therefore cannot stand in the way of a judgment on the pleadings for ERC.

are read as stand-alone, independently enforceable agreements, all of the provisions of the agreements are given meaning and function in a harmonious whole. See Coleman, 499 S.E.2d at 602 n.12 (stating agreements must be "construed, if possible, as to give meaning to every word, phrase and clause and also render all its provisions consistent and harmonious" (internal quotation marks and citation omitted)); Two Guys from Harrison-N.Y., 472 N.E.2d at 318 (same).

In short, this is not a situation where a complete contract contains "conflicting terms." (Opp. Br. at 9.) Here, "conflict" results only when the Defendants try shoehorn their theory of integration into the separate contracts. The Defendants have presented a choice between an interpretation of the contracts that works (ERC's) and one that does not (the Defendants'). That does not mean that there is an "ambiguity" requiring resort to extrinsic evidence. It means that there is only one way to read the contracts on their face.[19] Indeed, no discovery that the Defendants could obtain would change the outcome here, because it is well settled that extrinsic evidence cannot be used to "vary or contradict" the terms of a contract, see, e.g., Rudman, 280 N.E.2d at 872, which is precisely what the Defendants seek to do here.[20]

[19] As a last resort, the closing paragraph of Defendants' brief argues "alternatively" that their interpretation of the agreements produces no conflict if the Boone Lease's integration clause is interpreted to be a merger clause. (Opp. Br. at 27-28.) That makes no sense. The purpose of a merger clause is to keep other agreements out. See, e.g., In re Plitt, 233 B.R. at 845. By seeking to integrate the Boone Lease with twelve other agreements through the Settlement Agreement, Defendants squarely contravene the Boone Lease's express provision that "[t]his Lease constitutes the sole and entire existing agreement between the parties and expresses all the obligations of and restrictions imposed upon the parties." (Boone Lease, Ex. G, at § 23.7.)

[20] Notably, the Defendants do not dispute that even if the Payment Agreement were somehow integrated with the Settlement Agreement or any other agreement, it would still be severable for all of the reasons explained above. (ERC Br. at 29 n. 11.)

POINT V.

DEFENDANTS' COUNTERCLAIM SHOULD BE DISMISSED

For all of the reasons stated above, the Defendants have not pleaded any facts that would support a plausible inference that they have a claim for post-petition breach of contract, and their counterclaim should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court dismiss Defendants' Counterclaim with prejudice and enter an order that (a) the Payment Agreement is a non-executory contract for purposes of section 365 of the Bankruptcy Code, and (b) the Payment Agreement is not integrated with or is severable from the Assignments, the Boone Lease, the Settlement Agreement, or any other agreement.

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Respectfully Submitted,

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